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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 RICHARD DARREN FLECK,) Case No. SACV 09-01317-VBF (DTB)
12 Petitioner,)
13 vs.) ORDER TO SHOW CAUSE
14 DOMINGO URIBE, JR.,)
15 WARDEN,)
16 Respondent.)

17 On or about October 25, 2009,¹ petitioner lodged for filing a Petition for Writ
18 of Habeas Corpus by a Person in State Custody (“Pet.”) herein. The Petition purports
19 to be challenging a 1998 judgment of conviction sustained in Orange County Superior
20 Court Case No. 94WF2516. (See Pet. at ¶ 2). All of petitioner’s claims are
21 sentencing error claims. He contends that the trial court erred and that his counsel
22 rendered ineffective assistance, in connection with the restitution fine imposed at
23 sentencing. (See Pet. at ¶ 7.a-b; Pet. at 5a).
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25 ¹ October 25, 2009, is the signature date and thus the earliest date on which
26 petitioner could have turned the Petition over to the prison authorities for mailing.
27 See Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002) (holding that the prison
28 mailbox rule applies to a habeas petitioner’s state and federal filings); Huizar v. Carey,
273 F.3d 1220, 1223 (9th Cir. 2001) (same).

1 Since this action was filed after the President signed into law the Antiterrorism
2 and Effective Death Penalty Act of 1996 (the “AEDPA”) on April 24, 1996, it is
3 subject to the AEDPA’s one-year limitation period, as set forth at 28 U.S.C. §
4 2244(d). See Calderon v. United States District Court for the Central District of
5 California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997).² 28 U.S.C. § 2244(d)
6 provides:

7 “(1) A 1-year period of limitation shall apply to an application
8 for a writ of habeas corpus by a person in custody pursuant to the
9 judgment of a State court. The limitation period shall run from the latest
10 of--

11 (A) the date on which the judgment became final by
12 conclusion of direct review or the expiration of the time for
13 seeking such review;

14 (B) the date on which the impediment to filing an
15 application created by State action in violation of the Constitution
16 or laws of the United States is removed, if the applicant was
17 prevented from filing by such State action;

18 (C) the date on which the constitutional right asserted
19 was initially recognized by the Supreme Court, if the right has
20 been newly recognized by the Supreme Court and made
21 retroactively applicable to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim
23 or claims presented could have been discovered through the
24 exercise of due diligence.”

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27 ² Beeler was overruled on other grounds in Calderon v. United States
28 District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1 Here, the Petition failed to include any of the dates relating to petitioner's direct
2 appeal of his judgment for conviction. However, a review of the California Appellate
3 Courts website reveals that petitioner filed a direct appeal of his conviction with the
4 California Court of Appeals, Case Number G023456, in May, 1998, and that the Court
5 of Appeals issued a reasoned opinion affirming the judgment of conviction on August
6 31, 2000. Thereafter, petitioner filed a Petition for Review with the California
7 Supreme Court in Case Number S092383, which was denied on December 13, 2000.
8 Thus, "the date on which the judgment became final by conclusion of direct review
9 or the expiration of the time for seeking such review" was March 13, 2001, when the
10 90-day period for petitioner to petition the United States Supreme Court for a writ of
11 certiorari expired. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999);
12 Beeler, 128 F.3d at 1286 n.2. Therefore, for purposes of 28 U.S.C. § 2244(d)(1)(A),
13 petitioner's judgment of conviction "became final by conclusion of direct review or
14 the expiration of the time for seeking such review" on March 13, 2001, and his one-
15 year limitations period under the AEDPA expired on March 13, 2002, absent either
16 a late-trigger date or a basis for tolling of the statute.

17 From the face of the Petition, it does not appear that petitioner has any basis for
18 contending that he is entitled to a later trigger date under § 2244(d)(1)(B). In addition,
19 it is clear that petitioner has no basis for contending that he is entitled to a later trigger
20 date under § 2244(b)(1)(D) since petitioner was aware of the **factual** predicate of each
21 of his claims as of the date he was convicted and sentenced. See Hasan v. Galaza, 254
22 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when a
23 prisoner "knows (or through diligence could discover) the important facts, not when
24 the prisoner recognizes their legal significance").

25 Thus, unless a basis for tolling the statute existed, petitioner's last day to file
26 his federal habeas petition was March 13, 2002. See Patterson v. Stewart, 251 F.3d
27 1243, 1246 (9th Cir. 2001); Beeler, 128 F.3d at 1287-88.

28 28 U.S.C. § 2244(d)(2) provides:

1 “The time during which a properly filed application for State post-
2 conviction or other collateral review with respect to the pertinent
3 judgment or claim is pending shall not be counted toward any period of
4 limitation under this subsection.”

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6 In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), the Ninth Circuit construed
7 the foregoing tolling provision with reference to California’s post-conviction
8 procedures. The Ninth Circuit held that “the statute of limitations is tolled from the
9 time the first state habeas petition is filed until the California Supreme Court rejects
10 the petitioner’s final collateral challenge.” See id. at 1006. Accord, Carey v. Saffold,
11 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (holding that, for
12 purposes of statutory tolling, a California petitioner’s application for collateral review
13 remains “pending” during the intervals between the time a lower state court denies the
14 application and the time the petitioner files a further petition in a higher state court).
15 However, the statute of limitations is not tolled during the interval between the date
16 on which the judgment of conviction became final and the filing of the petitioner’s
17 first collateral challenge. See Nino, 183 F.3d at 1006.

18 Here, petitioner’s first collateral challenge was not filed until on or about
19 November 2, 2008.³ By then, the one-year limitation period already had lapsed and
20 could not be reinitiated. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
21 (holding that § 2244(d) “does not permit the reinitiation of the limitations period that
22 has ended before the state petition was filed,” even if the state petition was timely
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24 ³ In the Petition, petitioner indicates he filed three collateral challenges to
25 his conviction in state court. He filed a habeas petition in the Orange County Superior
26 Court on November 2, 2008, in the California Court of Appeal on a date uncertain
27 (according to the California Appellate Courts website, the petition to the Court of
28 Appeals was filed on March 9, 2009), and in the California Supreme Court on April
15, 2009. (See Pet. at ¶ 6).

1 filed); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264
 2 F.3d 894, 898-99 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir.
 3 2000).

4 The Ninth Circuit has held that the district court has the authority to raise the
 5 statute of limitations issue *sua sponte* when untimeliness is obvious on the face of the
 6 petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of the
 7 Rules Governing Section 2254 Cases in the United States District Courts, so long as
 8 the court “provides the petitioner with adequate notice and an opportunity to respond.”
 9 See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook, 260 F.3d
 10 1039, 1042-43 (9th Cir. 2001).

11 IT THEREFORE IS ORDERED that, on or before **January 15, 2010**, petitioner
 12 show cause in writing, if any he has, why the Court should not recommend that this
 13 action be dismissed with prejudice on the ground of untimeliness. If petitioner intends
 14 to rely on the equitable tolling doctrine, he will need to include with his response to
 15 the Order to Show Cause a declaration under penalty of perjury stating facts showing
 16 (1) that “extraordinary circumstances” beyond petitioner’s control stood in his way
 17 and were the proximate cause of his untimeliness, and (2) that he has been pursuing
 18 his rights diligently. See Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 1814,
 19 161 L. Ed. 2d 669 (2005); see also Roy v. Lampert, 465 F.3d 964, 969 (2006), cert.
 20 denied, 127 S. Ct. 1880 (2007); Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir.
 21 2006); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003).

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 23 DATED: December 1, 2009



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 26 DAVID T. BRISTOW
 UNITED STATES MAGISTRATE JUDGE